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(DELAWARE) INC.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JOSUE SOTO, GHAZI RASHID,  
MOHAMED ABDELFAH, on behalf of  
All Aggrieved Employees, All Others  
Similarly Situated, and the General Public,

Plaintiffs/Counterdefendant,

vs.

DIAKON LOGISTICS (DELAWARE) INC.,  
a foreign corporation; and  
DOES 1 through 50, inclusive,

Defendants/Counterplaintiff.

DIAKON LOGISTICS (DELAWARE) INC.,  
Third-Party Plaintiff,

vs.

SAYBE'S, LLC,  
Third-Party Defendant

**Case No. 08-cv-0033 L (AJB)**

**CLASS ACTION**

**ANSWER AND AFFIRMATIVE  
DEFENSES TO PLAINTIFFS'  
FIRST AMENDED COMPLAINT  
FOR INJUNCTIVE RELIEF,  
RESTITUTION,  
DISGORGEMENT OF PROFITS,  
AND CIVIL PENALTIES, AND  
COUNTERCLAIM FOR  
INDEMNITY**

1 Defendant/Counterplaintiff, Diakon Logistics (Delaware) Inc. (“Diakon”), by  
2 counsel, and pursuant to Fed.R.Civ.P. 8(b) and (c) and 13(a) respectfully submits the  
3 following Answer and Affirmative Defenses to Plaintiffs’ First Amended Complaint for  
4 Injunctive Relief, Restitution, Disgorgement of Profits, and Civil Penalties filed by  
5 Plaintiffs, Josue Soto (“Soto”), Ghazi Rashid (“Rashid”), and Mohamed Abdelfattah  
6 (“Abdelfattah”) (the “Complaint”), and its Counterclaim for Indemnity against Soto.

7 **ANSWER**

8 **I.**  
9 **Introduction**

10 1. Diakon denies the allegations contained in paragraph 1 of the Complaint.

11 2. Diakon admits Plaintiffs purport to bring this action pursuant to the statutory  
12 and regulatory provisions set out in paragraph 2 of the Complaint, but denies the remaining  
13 allegations contained in paragraph 2 of the Complaint.

14 3. Diakon admits Plaintiffs purport to bring this action pursuant to the statutes  
15 identified in paragraph 3 of the Complaint, but denies the remaining allegations contained in  
16 paragraph 3 of the Complaint.

17 **II.**  
18 **Jurisdiction and Venue**

19 4. For its answer to paragraph 4, Diakon incorporates by reference its answers  
20 to paragraphs 1 through 3 of the Complaint.

21 5. Diakon admits the allegations contained in paragraph 5 of the Complaint.

22 6. Diakon admits venue is proper in this Court, but denies the remaining  
23 allegations contained in paragraph 6 of the Complaint.

24 **III.**  
25 **Parties**

26 7. For its answer to paragraph 7, Diakon incorporates by reference its answers  
27 to paragraphs 1 through 6 of the Complaint.  
28





1           30. Diakon admits that Plaintiffs seek to bring this action on behalf of themselves  
2 and all others similarly situated as a class action, but denies the remaining allegations  
3 contained in paragraph 30 of the Complaint.

4           31. The allegations in paragraph 31 of the Complaint do not require a response.  
5 To the extent a response is required, Diakon denies the allegations contained in paragraph 29  
6 of the Complaint.

7           32. Diakon denies the allegations contained in paragraph 32 of the Complaint.

8           **A. Numerosity**

9           33. Diakon admits it has used the services of more than 100 independent  
10 contractor transportation service providers in the state of California, but denies the  
11 remaining allegations contained in paragraph 33 of the Complaint.

12           **B. Common Questions Predominate**

13           34. Diakon denies the allegations contained in paragraph 34 of the Complaint,  
14 and further states:

15           (a) Diakon admits that independent contractor transportation service  
16 providers perform their services pursuant to written "Service  
17 Agreements," but denies the remaining allegations contained in  
18 subparagraph 34(a) of the Complaint.

19           (b) Diakon admits certain independent contractor transportation service  
20 providers it has utilized have performed services in vehicles leased for  
21 a limited period of time from Diakon, but denies the remaining  
22 allegations contained in subparagraph 34(b) of the Complaint.

23           (c) Diakon admits certain of the independent contractor transportation  
24 service providers it has utilized have performed services in vehicles  
25 leased for a limited period of time from Diakon, but denies the  
26 remaining allegations contained in subparagraph 34(c) of the  
27 Complaint.  
28

- 1 (d) Diakon admits it utilizes technology to meet the expectations and  
2 requirements of its customers, but denies the remaining allegations  
3 contained in subparagraph 34(d) of the Complaint.
- 4 (e) Diakon denies the allegations of subparagraph 34(e).
- 5 (f) Diakon admits that the compensation to which independent contractor  
6 transportation service providers are entitled is distributed bi-monthly,  
7 but denies the remaining allegations contained in subparagraph 34(f)  
8 of the Complaint.
- 9 (g) Diakon denies the allegations of subparagraph 34(g) of the  
10 Complaint.
- 11 (h) Diakon denies the allegations contained in subparagraph 34(h) of the  
12 Complaint.
- 13 (i) Diakon denies the allegations contained in subparagraph 34(i) of the  
14 Complaint.
- 15 (j) Diakon denies the allegations contained in subparagraph 34(j) of the  
16 Complaint.
- 17 (k) Diakon denies the allegations contained in subparagraph 34(k) of the  
18 Complaint.
- 19 (l) Diakon admits that, pursuant to the FMCSR, it requires independent  
20 contractor transportation service providers to complete a record of  
21 their on-duty hours on a daily basis, but denies the remaining  
22 allegations contained in subparagraph 34(l) of the Complaint.
- 23 (m) Diakon denies the allegations of subparagraph 34(m) of the  
24 Complaint.
- 25 (n) Diakon denies the allegations of subparagraph 34(n) of the  
26 Complaint.  
27  
28

1           35. The allegations contained in paragraph 35 of the Complaint are questions of  
2 law to which no response is required. To the extent a response is required, Diakon denies  
3 the allegations contained in paragraph 35 of the Complaint.

4           **C. Typicality**

5           36. Diakon denies the allegations contained in paragraph 36 of the Complaint.

6           **D. Adequacy of Representation**

7           37. Diakon is without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations contained in paragraph 37 of the Complaint.

9           **E. Superiority of Class Action**

10          38. Diakon denies the allegations contained in paragraph 38 of the Complaint.

11                           **FIRST CAUSE OF ACTION**  
12                           **(Against All Defendant on Behalf of Plaintiffs and the CLASS)**

13                                   **Failure to Pay Minimum Wages**

14          39. For its answer to paragraph 39, Diakon incorporates by reference its answers  
15 to paragraphs 1 through 38 of the Complaint.

16          40. Diakon denies the allegations contained in paragraph 40 of the Complaint.

17          41. Diakon denies the allegations contained in paragraph 41 of the Complaint.

18                           **SECOND CAUSE OF ACTION**  
19                           **(Against All Defendant on Behalf of Plaintiffs and the CLASS)**

20                                   **Failure to Provide Proper Meal Breaks, or Compensation in Lieu Thereof**

21          42. For its answer to paragraph 42, Diakon incorporates by reference its answers  
22 to paragraphs 1 through 41 of the Complaint.

23          43. Diakon denies the allegations contained in paragraph 43 of the Complaint.

24          44. Diakon denies the allegations contained in paragraph 44 of the Complaint.

25          45. Diakon denies the allegations contained in paragraph 45 of the Complaint.

**THIRD CAUSE OF ACTION**

**(Against All Defendant on Behalf of Plaintiffs and the CLASS)**

**Failure to Provide Proper Rest Periods, or Compensation in Lieu Thereof**

46. For its answer to paragraph 46, Diakon incorporates by reference its answers to paragraphs 1 through 45 of the Complaint.

47. Diakon denies the allegations contained in paragraph 47 of the Complaint.

48. Diakon denies the allegations contained in paragraph 48 of the Complaint.

**FOURTH CAUSE OF ACTION**

**(Against All Defendant on Behalf of Plaintiffs and the CLASS)**

**Failure to Reimburse for Reasonable Business Expenses**

49. For its answer to paragraph 49, Diakon incorporates by reference its answers to paragraphs 1 through 48 of the Complaint.

50. Diakon denies the allegations contained in paragraph 50 of the Complaint.

51. Diakon denies the allegations contained in paragraph 51 of the Complaint.

52. Diakon denies the allegations contained in paragraph 52 of the Complaint.

**FIFTH CAUSE OF ACTION**

**(Against All Defendant on Behalf of Plaintiffs and the CLASS)**

**Failure to Provide Properly Itemized Wage Statements**

53. For its answer to paragraph 53, Diakon incorporates by reference its answers to paragraphs 1 through 52 of the Complaint.

54. The allegations contained in paragraph 54 of the Complaint are assertions of law to which no answer is required. To the extent an answer is required, Diakon denies the allegations contained in paragraph 54 of the Complaint.

55. Diakon denies the allegations contained in paragraph 55 of the Complaint.

56. Diakon denies the allegations contained in paragraph 56 of the Complaint.

57. Diakon denies the allegations contained in paragraph 57 of the Complaint.



**SIXTH CAUSE OF ACTION**  
**(Against All Defendant on Behalf of Plaintiffs and the CLASS)**

**Unlawful and Unfair Business Practices**

58. For its answer to paragraph 58, Diakon incorporates by reference its answers to paragraphs 1 through 57 of the Complaint.

59. The allegations contained in paragraph 59 of the Complaint are assertions of law to which no answer is required. To the extent an answer is required, Diakon denies the allegations contained in paragraph 59 of the Complaint.

60. The allegations contained in paragraph 60 of the Complaint are assertions of law to which no answer is required. To the extent an answer is required, Diakon denies the allegations contained in paragraph 60 of the Complaint.

61. The allegations contained in paragraph 61 of the Complaint are assertions of law to which no answer is required. To the extent an answer is required, Diakon denies the allegations contained in paragraph 61 of the Complaint.

62. Diakon denies the allegations contained in paragraph 62 of the Complaint.

63. Diakon denies the allegations contained in paragraph 63 of the Complaint.

64. Diakon denies the allegations contained in paragraph 64 of the Complaint.

65. The allegations set out in paragraph 65 of the Complaint relating to relief purportedly authorized by the California Business and Professions Code are assertions of law to which no answer is required. To the extent an answer is required, Diakon denies those allegations, and denies the remaining allegations contained in paragraph 65 of the Complaint.

66. Diakon denies the allegations contained in paragraph 66 of the Complaint.

**SEVENTH CAUSE OF ACTION**

67. For its answer to paragraph 67, Diakon incorporates by reference its answers to paragraphs 1 through 66 of the Complaint.

68. Diakon denies the allegations contained in paragraph 68 of the Complaint.

1           69. Diakon admits that Plaintiffs seek to bring this action on behalf of themselves  
2 and all other independent contractor transportation service providers, but denies the  
3 remaining allegations of paragraph 69 of the Complaint.

4           70. Diakon denies the allegations contained in paragraph 70 of the Complaint.

5           71. Diakon denies the allegations contained in paragraph 71 of the Complaint.

6           72. Diakon denies the allegations contained in paragraph 72 of the Complaint.

7           73. Diakon admits it received a copy of a letter from Derek J. Emge, counsel for  
8 Plaintiffs, to the California Labor and Workforce Development Agency (the "LWDA")  
9 dated July 18, 2007, purporting to notify the LWDA of alleged violations of the California  
10 Labor Code, but denies the remaining allegations contained in paragraph 73 of the  
11 Complaint.

12           74. Diakon admits that it received a copy of a letter from the LWDA dated  
13 August 16, 2007, purporting to advise that the LWDA did not intend to investigate certain  
14 allegations, but denies the remaining allegations contained in paragraph 74 of the  
15 Complaint.

16           75. The allegations in paragraph 75 of the Complaint are assertions of law to  
17 which no response is required. To the extent an answer is required, Diakon denies the  
18 allegations contained in paragraph 75 of the Complaint.

19           WHEREFORE, Defendant Diakon Logistics (Delaware) Inc. respectfully requests  
20 that Plaintiffs take nothing by way of their Complaint, for an award of attorneys fees and  
21 costs of this action, and for all other necessary and proper relief.

22                                   **AFFIRMATIVE DEFENSES**

23  
24           1. As independent contractors, Plaintiffs are not entitled to any of the relief  
25 requested.

26           2. The Complaint should be dismissed because Plaintiffs have failed to join  
27 persons needed for just adjudication, including Saybe's, LLC, Rashid Trucking, Inc., and  
28 Abdul Trucking, Inc.

1           3.       The Complaint should be dismissed because Plaintiffs are not the real parties  
2 in interest.

3           4.       The Complaint should be dismissed because Plaintiffs lack standing to assert  
4 claims on behalf of Saybe's, LLC, Rashid Trucking, Inc., and Abdul Trucking, Inc.

5           5.       The Complaint should be dismissed because Plaintiffs have failed to exhaust  
6 all administrative remedies available and required to secure the benefits and protections to  
7 which they claim to have been entitled pursuant to California law.

8           6.       Plaintiffs' Complaint should be dismissed because questions regarding the  
9 benefits and protections to which Plaintiffs claim to have been entitled, including Plaintiffs'  
10 entitlement to those benefits, and the amount of any benefits, are within the exclusive and  
11 primary jurisdiction of certain California state and/or federal administrative agencies.

12           7.       Plaintiffs' claims for damages are barred, in whole or in part, by Plaintiffs'  
13 failure to mitigate their damages.

14           8.       Plaintiffs have been reimbursed for all of their alleged business expenses  
15 through compensation they received for their services and therefore cannot recover those  
16 expenses.

17           9.       Some or all of Plaintiffs' claims are barred by the doctrine of laches.

18           10.      Some or all of Plaintiffs' claims are barred by the doctrine of payment.

19           11.      Some or all of Plaintiffs' claims are barred by the doctrine of waiver.

20           12.      Some or all of Plaintiffs' claims are barred by the doctrine of estoppel.

21           13.      Plaintiffs' claims regarding Diakon's alleged failure to provide meal and rest  
22 break periods under California law are barred because they are an undue burden upon  
23 interstate commerce in violation of the Commerce Clause of the U.S. Constitution, U.S.  
24 CONST. art. I, § 8, cl. 3.

25           14.      Plaintiffs' claims regarding Diakon's alleged failure to provide meal and rest  
26 break periods under California law are preempted under the Supremacy Clause of the U.S.  
27 Constitution, U.S. CONST. art. VI, cl. 2, because (a) California's meal and rest break rules  
28

1 conflict with the federal hours of service regulations, 49 C.F.R. Part 395, by imposing a  
2 different standard than that carefully set at the federal level by the Federal Motor Carrier  
3 Safety Administration (“FMCSA”); (b) the FMCSA’s regulation of the hours of service of  
4 drivers in interstate commerce through the federal hours of service regulations, 49 C.F.R.  
5 Part 395, leaves no room for additional or supplemental state regulation of drivers’ hours of  
6 service; and (c) California’s meal and rest break rules affect Diakon’s rates, routes, and  
7 services within the meaning of the express preemption provision of the Federal Aviation  
8 Administration Authorization Act (“FAAAA”), 49 U.S.C. § 14501.

9 15. Some or all of Plaintiffs’ claims are barred by the applicable statute of  
10 limitations.

11 16. Some or all of Plaintiffs’ claims are barred because Plaintiffs consented to the  
12 alleged conduct of Diakon.

13 17. Some or all of Plaintiffs’ claims should be reduced by the doctrine of set off.

14 18. Plaintiffs are not entitled to any penalty award under any California Labor  
15 Code provision because at all times relevant and material herein, Diakon acted in good faith  
16 and had reasonable grounds for believing that it did not violate the wage provisions of the  
17 California Labor Code.

18 19. Diakon will rely on all defenses lawfully available to it at the time of trial and  
19 reserves the right to amend its answer and affirmative defenses to include additional  
20 defenses after the completion of discovery.

21 WHEREFORE, Diakon respectfully requests that Plaintiffs take nothing by way of  
22 their Complaint, for an award of attorney fees and costs of this action, and for all other  
23 necessary and proper relief.  
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## **COUNTERCLAIM FOR INDEMNITY**

### **Parties**

1. Diakon is a Delaware corporation with its principal place of business located in Virginia, and is therefore a citizen of the states of Delaware and Virginia. Diakon is a national warehousing, logistics, and home delivery service provider serving various retailers in California. Diakon utilizes the services of independent contractor transportation service providers like Soto facilitate the delivery of merchandise for Diakon's customers.

2. Soto is a resident and therefore a citizen of California and entered into a Service Agreement (the "Service Agreement") with Diakon on or about May 4, 2005, pursuant to which Soto agreed to provide transportation services to Diakon. A copy of the Service Agreement is attached hereto as Exhibit A.

### **Jurisdiction and Venue**

3. This Court has supplemental jurisdiction over this Counterclaim under 28 U.S.C. § 1367(a) because the claims asserted in the Counterclaim are so related to the claims asserted in the Complaint that they form a part of the same case and controversy under Article III of the United States Constitution.

4. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(a).

### **Facts**

5. In the Service Agreement, Soto agreed, among other things, to transport items for Diakon's customers as an independent contractor.

6. The Service Agreement provides that Soto will

indemnify the Company [Diakon] harmless from any and all claims, losses, liabilities, costs and expenses of any kind whatsoever, including, without limitation, attorneys' fees (all of the foregoing being collectively referred to as "Indemnified Amounts") incurred by or asserted against the Company and arising out of, or resulting from, in whole or in part, the Contractor's [Soto's] performance including, without limitation, Indemnified Amounts arising out of, or resulting from, in whole or in part, the Contractor's performance of the services arising out of or relating to this agreement ....

Service Agreement, § 6.

1           7.     The Service Agreement further provides that Soto will  
 2                 pay to the Company [Diakon], on demand, any and all amounts  
 3                 necessary to indemnify the Company from and against all such  
 4                 Indemnified Amounts incurred by or asserted against the Company,  
 5                 and the Company shall have the right to set-off any such Indemnified  
                Amounts against any amounts owed by the Company to the  
                Contractor [Soto] under this Agreement.

6     Service Agreement, § 6.

7           8.     The claims asserted by Soto in this case, and the expenses Diakon has  
 8                 incurred to defend against them, arise out of and result from Soto's performance under the  
 9                 Service Agreement.

10          9.     Pursuant to the Service Agreement, Soto must indemnify, defend, and hold  
 11                 Diakon harmless from and against any and all claims, losses, costs, and expenses, including  
 12                 but not limited to judgments, reasonable attorneys' fees, and costs, resulting from or arising  
 13                 out of the claims Soto has asserted in this case.

14                 WHEREFORE, Diakon requests an award against Soto in an amount sufficient to  
 15                 fully and completely indemnify Diakon from and against any and all claims, losses, costs,  
 16                 and expenses, including but not limited to judgments, reasonable attorneys' fees, and costs,  
 17                 resulting from or arising out of the claims Soto has asserted in this case, plus pre-judgment  
 18                 and post-judgment interest, and any other relief this Court deems equitable and just.

19                         **DEMAND FOR JURY TRIAL**

20                 Diakon demands a trial by jury of all claims as to which it is entitled to a jury trial.

21  
 22     Dated: May 5, 2008

Respectfully submitted,

23                         **SCOPELITIS, GARVIN, LIGHT,**  
 24                         **HANSON & FEARY**

25                         By: s/James H. Hanson  
                               James H. Hanson

26                         Attorney for Defendant, Diakon Logistics  
 27                         (Delaware) Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed electronically this May 5<sup>th</sup>, 2008. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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